Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

BARBARA SKAGGS, as Guardian of the Person and Estate of Roy Skaggs, an incapacited person,
Petitioner,

v.

OTIS ELEVATOR COMPANY,
a New Jersey corporation,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the constitutional guarantee to trial by a fair and impartial jury include the preservation of the opportunity to prove implied bias on the part of a juror?

If so, must juror bias be presumed where a juror lies to the district court during *voir dire*, arguably so that the juror may secure a seat on the jury, and then lies again at an evidentiary hearing conducted by the district court in response to a challenge of the juror's impartiality, effectively precluding a finding of actual bias?

PARTIES TO THE PROCEEDING

Barbara Skaggs, as Guardian of the Person and the Estate of Roy Skaggs, an incapaciated person,

Plaintiff-Appellant,

v.

Otis Elevator Company, a New Jersey corporation,

Defendant-Appellee.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 164 F.3d 511 (10th Cir. 1998). A copy of the opinion is included in Appendix A . The Order of the District Court for the Northern District of Oklahoma denying the motion for new trial is included in Appendix C.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on December 29, 1998. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which was denied on February 2, 1999. (App. B).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . .

STATEMENT OF THE CASE

Petitioner filed suit against Respondent in the United States District Court for the Northern District of Oklahoma. Jurisdiction in the trial court was based on diversity of citizenship, 28 U.S.C. § 1332 (a).

After a four day jury trial, a verdict was entered for Respondent. Petitioner filed a motion for new trial after discovering that the jury foreman had given incorrect responses to the district court's questions during *voir dire*. Specifically, the juror failed to mention the fact that he had

been named as a party defendant in as many as nine lawsuits, including an adversarial proceeding brought by his bankruptcy trustee in which allegations of fraud were made.

On Petitioner's motion, the district court conducted an evidentiary hearing. The juror was the only witness to testify. Testimony revealed the juror to be an educated man, having obtained a degree from the University of Texas, and having worked, as he put it, in "international business" for major corporations.

When asked why he did not mention his extensive litigation history, he said he really didn't understand the question as it pertained to him because the term "lawsuits" was used. He felt the question did not "have any relevance" to him.

Upon questioning by the district court, the juror stated there was nothing about his litigation history which would have interfered with his ability to be fair and impartial. He then volunteered that he had more prejudice against large corporations than anything, and the he was the one person on the panel that did everything possible to help the plaintiff.[1]

After hearing the testimony from the juror, the district court made the following observations about the juror's credibility:

> "The Court finds that indeed this was a material question, and I can assure you that the

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[1]A claim not supported by the fact that the juror was elected foreperson of the jury at 1:30 p.m. and the jury reached a verdict at 1:45 p.m.

Court finds that he failed to answer it honestly. I'm not prepared to credit in any shape, manner or form the explanation proffered on the stand."

"It appears to me that the thrust of the argument at this time is now that we know he's a liar, that's a basis for cause."

"What forms the basis for the proposed dismissal for cause is had he answered honestly, would that form the basis for dismissal for cause. And there is nothing that I see in an honest response, assuming a capability not yet demonstrated in this court, that you would have on that. . ."

"And I will say that the only reason for having this take place in the conference room is that there is nothing about this ruling.....that I felt that I wanted to say out there such that this prospective – or this juror would think that he did something, that there was lack of merit in the motion. There is no lack of merit in the motion, and certainly insofar as anything that he would feel good about knowing. It is highly meritorious on the first prong. . ."

"I will further note that it certainly has occurred to me whether or not to refer this matter to the United States Attorney, recognizing that this was testimony under oath at the time of the voir dire process, and that's just a matter of further consideration by me, but to the extent that that consideration had

been raised earlier in this process, he did nothing today to dispel my feelings about it."

Notwithstanding those sentiments, the district court denied Petitioner's motion for new trial, finding that had the juror answered honestly, Petitioner would not have been able to challenge the juror for cause. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). The district court also held that it would not be appropriate to presume or infer bias, relying on Smith v. Phillips, 455 U.S. 209 (1982), O'Connor, J., concurring.

Petitioner filed a timely appeal with the United States Court of Appeals for the Tenth Circuit. During oral argument, counsel for Petitioner brought to the Panel's attention the recent decision of the Ninth Circuit in Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998). Counsel for Petitioner was directed to provide a copy of the decision with the appropriate cover letter following oral argument and he did so.

The Tenth Circuit affirmed the decision of the district court on December 29, 1998. The Panel noted that counsel for Petitioner had essentially conceded at oral argument that Petitioner could not satisfy the second prong of McDonough. Petitioner does not take issue with that finding.

The Panel also held that Petitioner failed to establish implied bias, indicating an unwillingness to hold that the juror's "pervasive dishonesty establishes, as a matter of law, that he harbored an implied bias" against Petitioner. (App. at 13a).

Petitioner's request for *en banc* review was denied on February 2, 1999.

ARGUMENT FOR GRANTING WRIT

Ordinarily, a post-trial evidentiary hearing is an adequate remedy to examine allegations of juror bias. The hearing permits counsel and the court to evaluate the juror's credibility as well as his proffered explanation for acting as he did. However, where the juror is pervasively dishonest in his responses to questions by counsel and the court, then it becomes impossible for the court to determine whether the juror is biased. In those rare circumstances, the court must infer bias on the part of the juror and order a new trial.

The Ninth Circuit Court of Appeals, sitting *en banc*, found accordingly in Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998). The opinion of the Tenth Circuit Court of Appeals below is in conflict with Dyer because the Panel held that Petitioner was required to show why the prospective juror lied before bias could be presumed. Such a requirement is impossible in a case, such as this, where the juror lies during *voir dire* and then lies repeatedly at the post-trial hearing.

ARGUMENT I

Bias must be implied when a juror deliberately lies about a material question during *voir dire*, then prohibits inquiry into the reasons for his dishonesty by providing pervasively dishonest responses at a post-trial hearing

Ordinarily, *voir dire* examination serves to protect the right of a litigant to a fair and impartial jury by exposing potential bias on the part of prospective jurors. In exercising peremptory challenges and challenges for cause, the litigants must rely on the truthfulness of the responses from the prospective jurors. However, when a juror wilfully conceals material information from the court and the parties, the *voir*

dire process cannot adequately serve it's purpose.

This Court has previously held that "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 171-172 (1950). The Court has stated that a post-trial hearing is a sufficient means to determine if indeed a juror has been biased. Smith v. Phillips, 455 U.S. 209, 217-218 (1982).

Although the Court has recognized preservation of the opportunity to prove *actual* bias is guaranteed by the constitutional right to an impartial jury, the Court has yet to make a similar proclamation with respect to claims of *implied* bias. This Court has defined implied bias as "a bias attributable in law to the prospective juror regardless of actual partiality." United States v. Wood, 299 U.S. 123, 134 (1936).

In their concurring opinion in McDonough, Justices Blackmun, Stevens and O'Connor wrote separately to state their understanding that the Court was not foreclosing the ability of a party to demonstrate, at a post-trial hearing, the existence of implied bias. 464 US. at 556.

In addition, Justice O'Connor, in her concurring opinion in Smith, wrote extensively on the issue of implied bias, concluding that the Court had not previously precluded the use of the "conclusive presumption of implied bias" and that the majority opinion likewise did not foreclose the use of implied bias challenges in appropriate circumstances. 455 U.S. at 221-224.

A litigant's right to a fair and impartial trial should not depend on whether a juror's bias is actual or implied because in either instance the juror has violated his oath to decide the

case solely on the evidence presented. This Court has recognized that such a violation of the juror's oath is punishable by contempt. Clark v. United States, 289 U.S. 1 (1933).

Writing for the Court in Clark, Justice Cardozo opined that a juror who gives wilfully evasive or knowingly untrue answers to the court and thereby obtains a seat on the jury through fraud "is a juror in name only. His relation to the court and to the parties is tainted in it's origin; it is a mere pretense and sham." 289 U.S. at 11.

Although it is appropriate to punish the juror through contempt proceedings, such a procedure does little good to the litigant who has been the victim of the juror's fraud and deceit. In such instances, the only remedy available to protect the right to a fair and impartial trial is to hold, as a matter of law, that the juror was biased, and to set aside any verdict tainted by the participation of such perjured juror.

The Ninth Circuit Court of Appeals confronted this question in Dyer and determined that bias indeed would be implied in such a case. The Court of Appeals held that a juror who lies "materially and repeatedly" introduces "destructive uncertainties" into the process. 151 F.3d 970, ¶ 54. The Court of Appeals also noted that an individual who lies to get a seat on the jury "has too much of a stake in the matter to be indifferent."

Unlike the Panel below, the Dyer Court did not require proof of actual bias and did not require Dyer to prove why the juror lied. Instead, the Court held that "a perjured juror is unfit to serve even in the absence of vindictive bias" and, as a matter of law, presumed bias where a juror lies to secure a seat on the jury. 151 F.3d 970, ¶¶53, 56.

The Court recognized that "[N]ot all jurors may walk a perfectly straight line" and candidly observed that "most irregularities can be shrugged off as immaterial to the fairness of the trial." 151 F.3d 970, ¶59. But in considering the magnitude of the juror's lies, the Court ultimately concluded that juror bias must be presumed. Id.

On the other hand, the Court of Appeals for the Tenth Circuit has taken a different approach. The Panel below concluded that a finding of implied bias on the basis of pervasively dishonest responses from a juror would require a finding of implied bias as a matter of law every time the first prong of the McDonough test is satisfied, which in turn would "inexorably eradicate" the second prong of the McDonough test by limiting the inquiry to the sole question of whether the juror's responses were honest or dishonest. (App. A at 12a).

The Tenth Circuit has failed to grasp the argument made by Petitioner and the holding of the Ninth Circuit in Dyer. Petitioner concedes that not every juror who gives an intentionally dishonest response is biased. Thus, the requirement for a post-trial hearing in cases where a juror's impartiality is challenged. Ordinarily, at the post-trial hearing, the juror will offer an explanation for his responses during *voir dire*, and the district court can evaluate the demeanor of the juror and the proffered explanation and make the appropriate determination with respect to the allegations of bias.

However, in those cases, such as Dyer and the instant case, where the juror refuses to admit the answers given during *voir dire* were incorrect or dishonest, and where the record clearly establishes a pattern of deception on the part of the juror, the district court's ability to protect the guarantee of a litigant's right to prove actual bias is destroyed, and bias

must be implied as a matter of law, unless there is compelling evidence which would remove any doubt as to the juror's impartiality. Doubts regarding juror bias must be resolved against the juror. United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976).

Such a finding does not eradicate the second prong of McDonough. When a rational and believable explanation is given by the juror for his dishonest or incorrect *voir dire* responses, McDonough would still apply and the party challenging the juror would still have to demonstrate that a correct response would have given rise to a challenge for cause. It is only when the juror lies "materially and repeatedly", thus preventing the district court and the parties from evaluating a juror's motives for giving incorrect or dishonest answers, that bias will be implied as a matter of law to protect the constitutional guarantee of a fair and impartial trial.

CONCLUSION

The Court should grant *certiorari* to recognize the use of implied bias challenges as a means to protect a litigant's right to a fair and impartial trial. Furthermore, the Court should resolve the conflict between the Ninth and Tenth Circuits on the issue.

Petitioner concedes that there are adequate safeguards to protect a litigant's right to a fair and impartial jury, to wit; the *voir dire* process, and when appropriate, a post-trial evidentiary hearing to evaluate claims of juror bias. Petitioner likewise concedes the wisdom of this Court's statement in McDonough that litigants are entitled to fair trials, not perfect trials.

However, there are circumstances when these safeguards are inadequate to protect the constitutional guarantee to a fair and impartial jury trial. The Court has recognized the seriousness of a juror's oath to answer questions propounded by the court honestly by holding that a violation of the oath to be punishable as contempt. When a juror does wilfully violate his oath and thereby obtains a seat on the jury, the proceedings are permanently and irreparably tainted unless some credible and believable explanation for the juror's conduct is given. Absent such an explanation, the constitutional right to a fair and impartial jury trial can protected only if the juror is found as a matter of law to be biased and the verdict returned by such juror set aside.

The Court should grant *certiorari*, reverse the Tenth Circuit and order a new trial.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed December 29, 1998]

No. 97-5213

BARBARA SKAGGS, as Guardian of the Person and the Estate of Roy Skaggs, an incapacitated person, Plaintiff-Appellant,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation, Defendant-Appellee.

DECISION

Appeal from the United States District Court
for the N. District of Oklahoma
(D.C. No. 96-CV-605)

Anthony M. Laizure, of Stipe Law Firm, Tulsa, Oklahoma, for Appellant.

Robert E. Manchester, of Manchester & Pignato, P.C.,

(Shannon K. Emmons and Stacey Haws Felkner, of Manchester & Pignato, P.C., with him on the brief), Oklahoma City, Oklahoma, for Appellee.

Before **BRORBY, MURPHY,** Circuit Judges, **MARTEN,*** District Judge.

MURPHY, Circuit Judge.

Barbara Skaggs ("Skaggs"), individually and as guardian of the person and estate of Roy Skaggs, was the plaintiff[1] in an civil lawsuit filed against defendant, Otis Elevator Company ("Otis"). After a four day jury trial, a verdict was entered for Otis. Skaggs filed a motion for a new trial after discovering that a member of the jury had given an incorrect response during voir dire questioning. The district court held an evidentiary hearing and found that the juror's response had been intentionally incorrect but that a correct response by the juror would not have provided Skaggs with a basis to challenge him for cause. The district court also held that Skaggs had failed to show either actual or implied bias on

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* Honorable J. Thomas Marten, United States District Judge, U. S. District Court for the District of Kansas, sitting by designation.

[1] Roy Skaggs was originally named as plaintiff in the lawsuit. Sometime after the lawsuit was filed, Roy Skaggs' wife, Barbara Skaggs, was substituted as plaintiff, both individually and in her capacity as guardian of the person and the estate of Roy Skaggs. Any reference hereinafter to "Skaggs" is to Barbara Skaggs, the substituted plaintiff.

the part of the juror and denied the motion. Skaggs appeals the district court's denial of the motion for a new trial and argues that the juror's intentionally dishonest answers during voir dire and during the post-trial hearing demonstrate that he was biased. This court has jurisdiction over this appeal from a final judgment pursuant to 28 U.S.C. § 1291. After examining the briefs of the parties and the record, this court **AFFIRMS.**

I. FACTUAL BACKGROUND

On January 5, 1995, Roy Skaggs was working on a construction site in the proximity of an elevator manufactured by defendant-appellee, Otis Elevator Company. Mr. Skaggs was injured when he was thrown against the elevator as it descended the elevator hoistway. Mr. Skaggs claimed he suffered serious and permanent injuries and that these injuries were the result of Otis' negligence. A four-day trial resulted in a jury verdict in favor of Otis.

Subsequent to the jury verdict, Skaggs discovered that the foreperson of the jury, Douglas Van Zandt, had been a named party in several lawsuits. During voir dire, the district court had directed the following question to the venire: "Have any of you-all, or members of your immediate family, ever participated in a lawsuit, either as a party or in some other capacity such as a witness?" No member of the panel, including Mr. Van Zandt, responded. Skaggs filed a motion for a new trial on the grounds that Van Zandt's failure to respond to the court's question during voir dire denied her a fair trial by an impartial jury. In the alternative, Skaggs requested an evidentiary hearing to probe the matters raised in the motion for a new trial.

The district court conducted the requested hearing and juror Van Zandt was questioned by the parties and by the court. At the hearing, Mr. Van Zandt admitted being involved in at least nine lawsuits. He admitted to filing bankruptcy and to being named as a defendant in several suits involving his nonpayment of financial obligations to third parties. Mr. Van Zandt also acknowledged that he had been divorced prior to 1985 and admitted that he had been charged with a felony for writing a "bogus" check in 1988.

During the hearing, Mr. Van Zandt was asked to explain why he had not responded affirmatively to the district court's question regarding his prior participation in lawsuits. He offered the following explanation: "I didn't understand [the question] as it pertained to me . . . ." When pressed by Skaggs' attorney, Van Zandt expanded on his explanation by stating that he believed the court, in posing the question, was searching for information on whether prospective jurors had been involved in lawsuits either similar to the one brought by Skaggs or involving significant damages, not lawsuits involving "my personal financial problems." Based on the evidence presented at the hearing, the district court found that Mr. Van Zandt had been intentionally dishonest when he failed to disclose his participation in the lawsuits. The court also found that the explanation given by Van Zandt for his silence during voir dire lacked credibility, stating: "I'm not prepared to credit in any shape, manner or form the explanation proffered on the stand." The court, however, held that Skaggs had failed to show Van Zandt was actually or impliedly biased against her and denied Skaggs' motion for a new trial. This appeal followed.

II. STANDARD OF REVIEW

A district court's denial of a motion for a new trial is reviewed for an abuse of discretion. *See Weese v. Schukman*, 98 F.3d 542, 549 (10th Cir. 1996). The ruling will be reversed only if the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* When the district court's decision turns on an issue of law, however, its determination on that question is reviewed *de novo*. *See id.*

III. ANALYSIS

The Seventh Amendment to the United States Constitution guarantees a litigant in a civil proceeding the right to a trial by jury. *See* U.S. Const. amend VII. Although the Seventh Amendment does not contain language identical to that found in the Sixth Amendment, which specifically guarantees a criminal defendant the right to an "impartial jury," the right to a jury trial in a civil case would be illusory unless it encompassed the right to an impartial jury.[2] "This right [to an impartial jury] is neither enlarged

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[2] We recognize that most of the reported cases addressing the issue of juror bias involve criminal defendants and, therefore, the right to an "impartial jury" guaranteed by the Sixth Amendment. Although the issue in this appeal is governed by the Seventh Amendment, the reasoning of the Sixth Amendment cases concerning juror bias is germane to the analysis of the issue raised by Skaggs herein. Additionally, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), discussed at length *infra*, involved civil litigants and not a criminal defendant.

nor diminished by the Fifth Amendment provision that a person shall not 'be deprived of life, liberty, or property, without due process of law.' [The] denial of trial by an impartial jury is also the denial of due process . . . ." *Casias v. United States*, 315 F.2d 614, 615 (10th Cir. 1963) (en banc).

It is a well-settled principle that a litigant is entitled to a fair trial, albeit not a perfect one. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). An impartial jury is an essential element of a litigant's right to a fair trial. *See id.* at 554. The examination of prospective jurors during voir dire is intended to expose possible juror biases and is employed to insure that jurors are impartial. *See id.* Not all juror biases, however, adversely affect a litigant's right to a fair trial. To violate due process, the bias must affect the juror's ability to impartially consider the evidence presented at trial. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982).

A. *The McDonough Test*

The Supreme Court has articulated a two-prong test to be applied to determine whether a litigant is entitled to a new trial in the face of allegations that a juror's voir dire responses were untruthful. "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556.

The first prong of the *McDonough* test is satisfied if

the movant can prove that the juror in question intentionally gave an incorrect answer. *See Gonzales v. Thomas*, 99 F.3d 978, 984 (10th Cir. 1996) (applying the *McDonough* test in a criminal case), *cert. denied*, 117 S. Ct. 1342 (1997). Additionally, the answer must have been in response to a material question. *See id.* A juror's honesty during voir dire is a factual determination reviewed for clear error. *See id.* at 985. The second prong of the McDonough test is met only if the movant can satisfactorily show the juror's correct response to the material question would have provided the movant with a valid basis to challenge the juror for cause. *See id.* at 984.

In this case, the district court held an evidentiary hearing during which the juror in question, Mr. Van Zandt, was questioned by the parties and by the court. After the hearing, the district court stated: "The Court finds that indeed this was a material question, and I can assure you that the Court finds that [Van Zandt] failed to answer it honestly." Nothing in the record indicates this finding is clearly erroneous. The record contains evidence that Mr. Van Zandt was educated and experienced in business and had the ability to understand the question posed by the district court. The wording of the question was straight-forward and unambiguous. Additionally, Mr. Van Zandt had been involved in not one, but at least nine lawsuits, a fact which would be difficult for most individuals to forget or overlook. The evidence in the record is more than ample to support the district court's finding that Van Zandt gave an intentionally dishonest answer to a material question posed during voir dire questioning. Therefore, the first prong of *McDonough* is satisfied.

The district court next concluded that if Van Zandt had

disclosed his participation in the lawsuits, he would not have been excused for cause during voir dire questioning. Skaggs conceded during oral argument in this appeal that Van Zandt's participation in the nine lawsuits would not have provided grounds for a challenge for cause. By her own admission, Skaggs has therefore failed to satisfy the second prong of the *McDonough* test. Correspondingly, the district court did not abuse its discretion in denying Skaggs' motion for a new trial on her *McDonough* claim.

B. *Actual or Implied Bias*

Before the *McDonough* test was adopted by the Supreme Court, litigants alleging juror impartiality had the opportunity to prove actual or implied bias on the part of a juror after a verdict was entered. *See, e.g., Williams v. United States*, 418 F.2d 372,377 (10th Cir. 1969). The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith*, 455 U.S. at 215.

Inability to satisfy the *McDonough* test does not always preclude a litigant from presenting evidence of a juror's actual or implied bias. *See Gonzales*, 99 F.3d at 985-86 ("Cases such as this one -- based on allegations of dishonest voir dire answers -- fall within a larger category that comprises all cases of alleged juror partiality, whatever the source of partiality."). *McDonough* merely provides a party who alleges juror dishonesty during voir dire with an additional vehicle to obtain a new trial by demonstrating juror bias. The advent of the test did not eliminate a litigant's broader historic right to prove actual or implied juror bias. *See id.* at 985-86.

Although unable to prove a juror's incorrect response to a material question was intentional, a movant may introduce evidence demonstrating bias on the part of a juror who gave an incorrect but not intentionally dishonest answer during voir dire. *See, e.g., id.* at 985-91; *see also United States v. Lawhorne*, No. CR. 3:96CR139, 1998 WL 833853, at *18 (E.D. Va. 1998) (holding that a juror who unintentionally gave an incorrect answer during voir dire was nevertheless actually biased in favor of the prosecution). Consonantly, as in this case, a movant may be unable to prove that a juror's intentionally incorrect answer to a material question would have provided a basis for challenge for cause. The movant who fails to prove the second prong of the *McDonough* test has necessarily failed to prove that the juror's actual or implied bias could have been established from the juror's correct response. Nevertheless, evidence of the juror's motive for intentionally providing an incorrect answer, or evidence of additional circumstances occurring outside the voir dire process, may demonstrate the juror's bias. In such unusual situations, a litigant should not be foreclosed from introducing evidence to demonstrate that the juror was biased and that the bias affected the litigant's right to a fair trial.

A litigant who makes a general claim of juror bias may be entitled to a hearing at which she has the opportunity to prove the alleged bias. *See Burton v. Johnson*, 948 F.2d 1150, 1156 (10th Cir. 1991). "[I]t remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred." *McDonough*, 464 U.S. at 556-57 (Blackmun, J.,

concurring). The moving party bears the burden of establishing juror bias. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

Actual bias is a factual finding reviewed for clear error. *See Gonzales*, 99 F.3d at 986. Actual bias can be shown by the express admission of the juror.[3] *See, e.g., United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992). A finding of actual bias is "based upon express proof, e.g., . . . admission by the prospective juror of a state of mind prejudicial to a party's interest." *United States v. Haynes*, 398 F.2d 980, 984 (2d. Cir. 1968).

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[3] It appears that some confusion has crept into the definition of the term "actual bias." In a line of cases, this court has stated that "[a]ctual bias may be found either by an express admission, or by proof of specific facts which show such a close connection to the facts at trial that bias is presumed." *Baca v. Sullivan*, 821 F.2d 1480, 1483 (10th Cir. 1987); *see also Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504, 1514 (10th Cir. 1997); *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1467 (10th Cir. 1994); *Burton v. Johnson*, 948 F.2d 1150, 1159 n.10 (10th Cir. 1991). This definition of actual bias more accurately includes both actual bias (i.e., a question of fact which may be proved by a juror's express admission), and implied bias (i.e., a question of law proved by facts which show such a close connection between the juror's experiences and the facts at trial that bias can be presumed as a matter of law). *See, e.g., United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992); *United States v. Wood*, 299 U.S. 123, 133 (1936) ("The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.").

The determination of implied bias is a question of law reviewed *de novo*. *See Burton*, 948 F.2d at 1158. Implied bias can be proved by showing that the juror had a "personal connection to the parties or circumstances of the trial." *Gonzales*, 99 F.3d at 987. These types of situations include "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) (discussing implied bias in a criminal case). Implied bias can also be found when there are similarities between the personal experiences of the juror and the issues being litigated. *See Gonzales*, 99 F.3d at 987. "[I]mplied bias may be found even though a juror denies any partiality." *Id.* A juror's dishonesty during voir dire is one factor to be considered when determining whether the juror was impliedly biased. *See id.* at 989.

In addition to her *McDonough* claim, Skaggs asserts a general claim of juror bias based upon juror Van Zandt's dishonesty. The premise of Skaggs' argument is that the only reasonable explanation for Van Zandt's dishonesty is that he was biased against Skaggs and lied to insure that he would be seated on the jury and influence the outcome of the civil trial. The district court ordered a post-trial hearing to address Skaggs' claim of juror bias. Skaggs was given the opportunity to question Van Zandt and attempt to uncover the reason for his intentionally incorrect answer.

During the post-trial hearing, Van Zandt never expressly admitted that he was biased against Skaggs. To the contrary, Van Zandt emphatically and repeatedly denied any

bias against Skaggs. During questioning by Skaggs' attorney he responded: "And I can also tell you that in no way possible did this bias me in any way with my decision or that jury's decision." When questioned by the court, Van Zandt replied: "I did not bring any point of view to this proceeding as a result of anything that had happened to me in the past, sir." During the hearing, Skaggs was unable to elicit from Van Zandt an admission of his bias against Skaggs. Although the district court did find that Van Zandt's explanation of why he failed to disclose his participation in lawsuits was not credible, it did not specifically find that his assertion that he was not biased lacked credibility. "'[T]he district court is in the best position to observe the juror and to make a first-hand evaluation of his ability to be fair.'" *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1467 (10th Cir. 1994) (quoting *Wilson v. Johns-Manville Sales Corp.*, 810 F.2d 1358, 1361 (5th Cir. 1987)). Accordingly, the district court's finding that Skaggs failed to prove actual bias on the part of Van Zandt was not clearly erroneous.

Although she has failed to demonstrate actual bias, Skaggs advocates that Van Zandt's bias against her should be implied from either the fact that he gave an intentionally dishonest answer during voir dire or from the fact that he lied again during the post-trial hearing.

To adopt Skaggs' argument that Van Zandt's bias can be implied solely from his dishonest response during voir dire would require this court to hold that any time the first prong of the *McDonough* test is satisfied, the juror is biased as a matter of law. Such a ruling would inexorably eradicate the second prong of the *McDonough* test. It would reduce the *McDonough* inquiry to the sole question of whether the

juror's response was honest or dishonest. *See Gonzales*, 99 F.3d at 989 (a juror's dishonesty during voir dire is just one factor to be considered when evaluating a claim of implied bias). While Skaggs may have been unable to uncover the true reason Van Zandt gave an intentionally dishonest answer during voir dire, Skaggs offered no evidence during the post-trial hearing from which this court could conclude that Van Zandt's reason for remaining silent during voir dire was to ensure himself a seat on the jury. An equally plausible explanation for Van Zandt's silence may be his embarrassment to admit before the court and the venire that he had experienced financial difficulties and consequent litigation.

The district court's finding that Van Zandt's explanation for his silence during voir dire lacked credibility is not clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). Skaggs has not shown, however, that Van Zandt's subsequent dishonesty during the post-trial hearing demonstrates that he was biased against Skaggs. At the post-trial hearing, Van Zandt may have fabricated an explanation for his silence during voir dire because he was embarrassed that his previous lie had been uncovered.

Whatever the reason for Van Zandt's dishonesty, the record does not establish that he responded dishonestly during voir dire and again during the post-trial hearing because he had an implied bias against Skaggs. In the absence of any other evidence establishing Van Zandt's implied bias, we are unwilling to hold that Van Zandt's pervasive dishonestly establishes, as a matter of law, that he harbored an implied bias against Skaggs.

IV. CONCLUSION

The district court's finding that Skaggs failed to show actual bias was not clearly erroneous. Additionally, we hold that, as a matter of law, Skaggs has not shown implied juror bias. Accordingly, the district court did not abuse its discretion when it denied Skaggs' motion for a new trial on her general claim of juror bias.

The judgment of the district court is **AFFIRMED.**

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed February 2, 1999]

No. 97-5213

BARBARA SKAGGS, as Guardian of the Person and the Estate of Roy Skaggs, an incapacitated person, Plaintiff-Appellant,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation, Defendant-Appellee.

ORDER

Before **BRORBY**, **MURPHY**, Circuit Judges, **MARTEN**,* District Judge.

* The Honorable J. Thomas Marten, United States District Judge, U.S. District Court for the District of Kansas sitting by designation.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/_____
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed November 4, 1997]

No. 96-CV-605-H

BARBARA SKAGGS, as Guardian of the Person and the Estate of Roy Skaggs, an incapacitated person, Plaintiff,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation, Defendant.

ORDER

This matter comes before the Court on the Plaintiff's motion for a new trial, or in the alternative, request for evidentiary hearing (Docket # 57). This matter was tried before a jury from July 14 to July 17, 1997. A jury verdict in favor of Defendant Otis Elevator Company ("Otis") was entered in this case on July 17, 1997, with final judgment in favor of Otis entered on the docket on August 1, 1997 (Docket #55). Plaintiff now requests a new trial on the

grounds that one of the prospective jurors failed to give an honest answer to the one of the Court's inquiries during voir dire. An evidentiary hearing was held in this matter on October 30, 1997 in accordance with McDonough Power Equip. v. Greenwood, 464 U.S. 548 (1984) and Gonzales v. Thomas, 99 F.3d 978 (10th Cir. 1996).

Fed. R. Civ. P. 59(a) provides that

> [a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States ....

The Supreme Court articulated the standard for a new trial under this Rule in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). The Court held that to obtain a new trial, a party must "first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." Id. at 556.

In the instant case, Plaintiff contends that one of the jurors in this action, Douglas Van Zandt, failed to respond honestly to questions during voir dire. Specifically, the Court inquired during voir dire whether any member of the panel had participated in a lawsuit as either a party or a witness, or whether any member had a close relative that had been involved in a lawsuit. Mr. Van Zandt remained silent despite the fact that he, according to the evidence adduced at the evidentiary hearing, has been involved in at least six lawsuits

from 1988 until May 7, 1997. Plaintiff argues that Mr. Van Zandt's failure give honest answers to these material questions posed by the Court masked his bias, thereby denying Plaintiff's right to a fair trial. Further, Plaintiff argues that given Mr. Van Zandt's negative experiences within the legal system, it is "hardly probable that [Mr.] Van Zandt could be fair to Plaintiff, who was seeking a substantial sum of money from the Defendant." Pl. Br. at 6.

The Court finds that Plaintiff has failed to make the showing required to satisfy the McDonough standard. To succeed, Plaintiff must establish that a correct response from Mr. Van Zandt would have provided a valid basis for a challenge for cause. To establish a causal challenge, Plaintiff must demonstrate actual prejudice or bias on Mr. Van Zandt's part. Vasey v. Martin Marietta Corp, 29 F.3d 1460, 1467 (10th Cir. 1994).

According to the record, Mr. Van Zandt has been involved in at least the following lawsuits:

1. In re Van Zandt, Douglas Thornton and Van Zandt, Sandra Yvonne, Debtors, No. 96-03919 (Bankr. N.D. Okla.) (filed September 30, 1996; dismissed May 7, 1997).

2. Kirtley, Trustee v. Van Zandt and Van Zandt, No. 96-0432-W (Bankr. N.D. Okla. Dec. 26, 1996).

3. Carle, Higgings, Mosier, & Taylor, v. Van Zandt and Van Zandt, No. SC-96-182 (Rogers Co. Dist. Ct.)

4. Baden v. Van Zandt and Van Zandt, No. CJ-96-418 (Rogers Co. Dist. Ct.)

5. Cole v. Van Zandt and Van Zandt, No. SC-95-264 (Tulsa Co. Dist. Ct.)

6. Oklahoma v. Doug Van Zandt, No. CRF 88-263 (Rogers Co. Dist. Ct. Nov. 15, 1988).

Additionally, in the bankruptcy proceeding filed September 30, 1996, three parties were listed in the papers as judgment creditors: Claremore Welding Supply for a claim incurred in August, 1994; Edward Arrigoni for a claim incurred in September, 1994; and Tass, Inc. for a claim incurred April, 1995.

Clearly, Mr. Van Zandt was not involved in any action similar to the instant case for personal injury. Thus, there is nothing in the litigation record that, on its face, would support a challenge for cause. It is settled law that the fact that Mr. Van Zandt has been involved in prior litigation does not alone necessitate striking him for cause. McDonough 464 U.S. at 556. Further, during the evidentiary hearing in this matter, the Court questioned Mr. Van Zandt about his previous litigation and is satisfied that his failure to give honest answers to questions during voir dire established no valid basis for a challenge for cause. Accordingly, the Court finds that a new trial is not warranted under McDonough.

The Court further finds that Plaintiff has failed to demonstrate actual or implied bias so as to warrant a new trial. Gonzales, 99 F.3d at 985 (10th Cir. 1996), cert. denied,

117 S. Ct. 1342 (1997). In Gonzales, the Tenth Circuit considered a situation where it could not be said that the juror gave a dishonest answer during voir dire. Id. at 985. In that case, the party challenging the fairness of the jury fails the first prong of the McDonough test. Gonzales, 99 F.3d at 985. The Tenth Circuit explained that the McDonough test is not the only avenue available to a party seeking relief on the basis of juror impartiality. Gonzales, 99 F.3d at 985. Instead, the trial court may order a hearing to determine whether actual bias existed or whether bias is, in exceptional cases, to be presumed. Id. (interpreting McDonough 464 U.S. at 556 (Blackmun, J., concurring)).

First, this is not the case where bias can be presumed or inferred. As described in Smith v. Phillips, 455 U.S. 209 (1982), those cases concern matters such as "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." Id. at 222 (O'Connor, J., concurring). And, as already determined under the McDonough test, neither is this a case where actual bias exists.

The Court is very troubled that any juror would fail to give honest responses to questions during voir dire. However, the Court concludes that, based on the record in this case, including the questioning of Mr. Van Zandt at the evidentiary hearing in this matter, Plaintiff has failed to establish the requirements for a new trial under applicable law. Accordingly, Plaintiff's motion for a new trial is hereby denied.

IT IS SO ORDERED.

This 4th day of November, 1997.

/s/_____
Sven Erik Holmes
United States District Judge

Supreme Court, U.S.
FILED
JUN 3 1999
OFFICE OF THE CLERK

No. 98-1771

IN THE

Supreme Court of the United States

BARBARA SKAGGS, a Guardian of the Person and Estate of Roy Skaggs, an incapacitated person,

Petitioner,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a violation of the constitutional guarantee of trial by an impartial jury be presumed, and a new trial required, simply because a juror failed to admit participation in past lawsuits on *voir dire*, even though a post-trial evidentiary hearing disclosed no evidence of actual bias and no connection between the juror and the parties or the facts of the case?

STATEMENT PURSUANT TO RULE 29.6

Respondent Otis Elevator Company (Otis), a New Jersey corporation, is a wholly owned subsidiary of United Technologies Corporation (UTC).

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STATEMENT OF THE CASE

This petition for certiorari seeks a new trial on the basis of an allegedly dishonest answer given by a juror during *voir dire*. The underlying lawsuit was a negligence action brought by Petitioner Barbara Skaggs (Petitioner) to recover for injuries sustained by her husband Roy Skaggs (Skaggs) when he severed the hydraulic line of an Otis elevator, in a building where he was performing construction work, by dropping a large concrete block into the elevator shaft. Although it was undisputed Skaggs was severely injured, Petitioner's evidence of liability was extremely weak and the jury returned a verdict in favor of Respondent Otis Elevator Company (Otis) after only a few minutes of deliberation.

After receiving an adverse verdict, Petitioner searched court records and learned the jury foreman, Douglas Van Zandt, had filed bankruptcy and had been named in several lawsuits arising out of that bankruptcy. Van Zandt had failed to respond affirmatively to a general *voir dire* question asking whether the jurors or any family members had been a party or witness in a lawsuit. Petitioner filed a motion for new trial, or in the alternative, an evidentiary hearing. The request for evidentiary hearing was granted; after questioning of Van Zandt by counsel for both parties and the court, and review of the documents presented by Petitioner, the trial court found neither actual nor implied bias and denied the motion for new trial. This decision was affirmed by the Tenth Circuit, and Petitioner now seeks certiorari in this court.

While the Petition for Certiorari presents two questions for review, only the latter is legitimately at issue. It is

unnecessary to resolve the legal issue of whether the constitution guarantees an evidentiary hearing in every case in which implied bias is alleged, because it is undisputed a full evidentiary hearing was conducted in the instant case. Petitioner was given an opportunity to present the court records demonstrating past participation in lawsuits; the juror was subpoenaed and questioned by counsel for both parties and the court. A transcript of the evidentiary hearing is attached as Respondent's Supplemental Appendix (Supp. App.).

There is no suggestion counsel for Petitioner was limited or restricted in his efforts to demonstrate bias at the hearing. *See* Supp. App. at 23a, 25a, 30a. Petitioner makes no argument that a more in depth hearing would have demonstrated actual bias or any factual basis to imply bias. She concedes that the undisclosed bankruptcy and related lawsuits provide no basis for a challenge for cause. *See* Petition for Certiorari (Pet.) at 4. Petitioner instead asks this Court to set aside the objective, reasoned analysis of *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984) in favor of a rule that any omission on *voir dire*, if coupled with an unconvincing explanation for the omission at a subsequent evidentiary hearing, mandates a presumption the juror was biased against the losing party and therefore warrants a new trial.

The implied bias standard proposed by Petitioner permits post-trial disqualification of a juror for failure to disclose information which would not have supported a challenge for cause prior to trial; it also relieves the moving party of any burden of proving bias. Thus this standard would reward litigants who fail to make diligent pre-trial efforts to assess juror qualifications, experiences, opinions, beliefs or prejudices.

An overview of the facts and procedural history relevant to jury selection and the alleged juror bias is set forth below. As this summary illustrates, adoption of an implied bias rule broad enough to grant a new trial to Petitioner in this case would allow the losing party in almost every case to move for a new trial on the basis of potential juror bias. The burden to the judicial system which concerned this Court in *McDonough*, *see id.* at 553, would expand exponentially as every litigant received multiple trials in an futile quest to seat a "perfect" jury.

A. The Jury Selection Process

Petitioner sued Otis for negligence in the United States District Court for the Northern District of Oklahoma, and the case was placed on the July 1997 trial docket. Under the jury selection process in effect in the Northern District in 1997, jurors were summoned and qualified for jury service four times a year; once jurors were qualified in open court, a list of potential jurors was published by the court clerk's office and provided to counsel for any party upon request.[1] The list from which the jurors in the instant case were drawn was published on April 21, 1997, more than three months prior to trial; it contained 186 names, including Douglas Van Zandt.

---

1. *See* Local Civil Rules of the United States District Court for the Northern District of Oklahoma, effective January 1, 1995, Rule 47.1 "Random Selection of Grand and Petit Jurors." The pertinent portion of this rule provides:

> *Until they have been qualified in open court*, the names of persons summoned for grand or petit jury service shall not be made public . . . (emphasis added).

On July 14, 1997, the trial court conducted *voir dire*, asking several questions of the prospective jurors as a group. The questions were whether any juror knew the attorneys, whether any juror knew the parties, whether any juror recognized the names on either party's witness list, whether any juror had served as a juror before, whether any juror or family member had participated in a lawsuit as a party or witness, whether any juror had a philosophical view that damages should be limited, whether any juror had been involved in a work related accident, whether any juror would have difficulty separating the issues of liability and damages, whether any juror had been stuck in an elevator, and whether any juror or family member had suffered substantial injuries as a result of an accident. No juror responded to the question regarding participation in a lawsuit. At the request of Petitioner's counsel, the trial court individually questioned one juror, the City Clerk of Catoosa, whether she had been involved as a witness in cases where the City was sued.

Fourteen potential jurors were seated in the jury box, and each side exercised three peremptory challenges. The remaining eight were seated as jurors.[2] After four days of trial, the case was submitted to the jury on July 17, 1997. As Petitioner notes, the jury returned a defense verdict after only a few minutes of deliberation.

B. The Post-Trial Allegations of Juror Bias

After receiving an adverse verdict, and presumably after concluding there was no reversible error in the trial record,

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2. Under Rule 48.1 of the Northern District Rules, civil juries can have anywhere from six to twelve members, unless the parties agree to less than six.

Petitioner began investigating the jurors' backgrounds. Through this investigation, Petitioner learned that juror Van Zandt had filed bankruptcy and had been sued by several creditors. Petitioner filed a motion for new trial, or in the alternative, request for an evidentiary hearing, arguing that juror Van Zandt's failure to answer honestly the *voir dire* question about participation in lawsuits concealed the juror's bias and thus denied Petitioner a fair trial. The request for an evidentiary hearing was granted.

The bankruptcy and other lawsuits presented in the motion for new trial were filed in 1995 and 1996. All were a matter of public record prior to trial and prior to publication of the list of prospective jurors in April of 1997. If jurors' past experiences with the judicial system was a matter of substantial concern to Petitioner, the list of potential jurors could have been requested from the court clerk and the same search of court documents which revealed Van Zandt's litigation history could have been conducted between April and July of 1997. By expending this effort, any suspected prejudice harbored by Van Zandt could have been negated with a peremptory challenge.

Reviewing the litigation history of 186 potential jurors undeniably costs a litigant more than investigating only the eight jurors finally seated; however, as this Court recognized in *McDonough*, invalidating a verdict after the fact "simply to recreate the peremptory challenge process" requires a greater investment of private and social resources than the system can be expected to give. *Id.* at 555. If a litigant is unwilling to accept anything less than a "perfect" trial, which *McDonough* recognizes is illusory, then he or she must expect to bear the additional costs of seeking perfection.

Even if Petitioner can be excused for delaying her investigation of the jurors' litigation history until jury selection was complete, she had an obligation to complete this investigation and present her concerns to the trial court before the case was submitted to the jury.[3] If the information presented in the motion for new trial had been brought to the trial court's attention prior to submission, the court could have, if it deemed it necessary to do so, dismissed Van Zandt and continued with seven jurors, thus avoiding the allegation of bias with no additional burden to the judicial system. In *McDonough,* this court recognized that if the information forming the basis of the request for new trial was known to counsel at the time of *voir dire*, but counsel chose not to question the juror further, then the respondents would be barred from later challenging the composition of the jury. *Id.* at 847, n.2. In the instant case, while Van Zandt's litigation history may not have been "known" to Petitioner prior to *voir dire*, it was available to counsel as a matter of public record.

C. The Evidentiary Hearing

Despite Petitioner's failure to investigate potential prejudice in a timely manner, the trial court granted Petitioner's request for an evidentiary hearing. Juror Van

---

3. Otis is not conceding that a juror's participation in routine litigation such as bankruptcies and divorces will have any discernible effect on the juror's willingness or ability to serve as an impartial juror in a personal injury case. However, if Petitioner truly believes any juror who has had negative experiences within the legal system would have difficulty being fair to a plaintiff seeking substantial damages, then Petitioner should have investigated this potential prejudice as soon as possible rather than waiting to see whether the verdict would be favorable.

Zandt testified at the October 30, 1997 hearing pursuant to subpoena. Supp. App. at 2a. Petitioner's counsel was given an opportunity to question Van Zandt at length regarding the reasons for his omission on *voir dire*. Supp. App. at 3a-22a, 25a. Van Zandt explained he failed to respond to the question regarding participation in lawsuits because he was thinking of "lawsuits" in the context of someone being hurt, or suffering horrible damages, and did not realize his personal matters like bankruptcy or divorce were relevant. Supp. App. at 20a-21a.[4] The trial court refused to credit this explanation, finding Van Zandt was intentionally dishonest during *voir dire*. Supp. App. at 36a. However, the court recognized that dishonesty, standing alone, does not entitle a litigant to a new trial under *McDonough*. Supp. App. at 37a-38a. The court then considered whether the undisclosed information, the bankruptcy and other litigation, would support a challenge for cause and concluded it would not. Supp. App. at 36a-38a.

Although the trial court's application of the *McDonough* test was correct, it is important to note the court did not confine its analysis solely to *McDonough*. The court questioned Van Zandt regarding his omission and specifically probed the issue of whether Van Zandt's litigation history would interfere with his ability to be completely fair as a juror. App. C at 20a-21a; Supp. App. at 25a-29a. Thus, Petitioner received the opportunity to prove actual bias guaranteed by *Smith v. Phillips*, 455 U.S.

4. This explanation is similar to the explanation given by the juror in *McDonough*, that he did not understand the question about past accidents to apply to him because he did not consider the broken leg sustained by his son as a result of an exploding tire to be an injury resulting in prolonged pain and suffering. *See id.* at 551, n.3.

209 (1982). Finally, the trial court considered whether any facts existed from which bias could be presumed or inferred. App. C at 21a. Applying the standards for implied bias defined in Justice O'Connor's concurring opinion in *Smith,* the trial court found no basis to imply bias. App. C at 21a.

D. The Decision of the Tenth Circuit

The trial court's decision was affirmed by the Tenth Circuit on December 29, 1998. The Tenth Circuit agreed Petitioner had failed to satisfy the second prong of *McDonough,* because Van Zandt's litigation history would not have provided grounds for a challenge for cause. App. A at 8a. However, the Tenth Circuit did not conclude its analysis with *McDonough.* Instead, the court held that the advent of the *McDonough* test did not eliminate a litigant's broader historic right to prove actual or implied bias. App. A at 8a, citing *Gonzales v. Thomas*, 99 F.3d 978, 985-986 (10th Cir. 1996). Thus, the court stated:

> The movant who fails to prove the second prong of the *McDonough* test has necessarily failed to prove that the juror's actual or implied bias could have been established from the juror's correct response. Nevertheless, evidence of the juror's motive for intentionally providing an incorrect answer, or evidence of additional circumstances occurring outside the voir dire process, may demonstrate the juror's bias. In such unusual situations, a litigant should not be foreclosed from introducing evidence to demonstrate that the juror was biased and that the bias affected the litigant's right to a fair trial. App. A at 9a.

The Tenth Circuit recognized the district court is in the best position to observe the juror and make a first hand evaluation of his ability to be fair and noted that, while the district court found Van Zandt's explanation of why he failed to disclose his litigation history lacked credibility, the district court did not make any finding that Van Zandt's assertion he was not biased lacked credibility. App. A at 12a, citing *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1467 (10th Cir. 1994). This analysis is consistent with *Patton v. Yount*, 467 U.S. 1025, 1038-1039 (1984) (The determination of whether a juror's protestation of impartiality should be believed is essentially one of credibility, and therefore of demeanor, which the trial judge is best suited to determine.)

The Tenth Circuit rejected Petitioner's argument that the only reasonable explanation for Van Zandt's dishonesty was bias against Skaggs and a desire to influence the outcome of the trial. *See* App. A at 11a. The court held Petitioner had presented no evidence during the evidentiary hearing from which it could conclude that Van Zandt's reason for remaining silent during *voir dire* was to ensure himself a seat on the jury. App. A at 13a. The court recognized there are other equally plausible explanations for Van Zandt's silence during *voir dire*, such as embarrassment about his financial difficulties, and other plausible explanations for fabrication at the evidentiary hearing, such as embarrassment he had been caught in a lie during *voir dire*. App. A at 13a. This analysis is consistent with this Court's statement that "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough* at 556. Given plausible explanations for the dishonest response which do not suggest impartiality,

the Tenth Circuit reasonably rejected Petitioner's request to drastically expand the law of implied bias by creating a presumption of bias any time a juror is caught in a lie. App. A at 13a.

REASONS FOR DENYING THE WRIT

The decision of the Tenth Circuit was not only reasonable, it was the only possible decision in accord with the rules governing juror bias established by this court in *McDonough* and *Smith.* The rule suggested by Petitioner eliminates the objective standard for identifying juror bias developed in *McDonough* and ignores the dictate of *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) that the moving party must bear the burden of establishing juror bias. If this rule were adopted every trial would be subject to reversal, perhaps more than once. The fundamental, practical principles of finality and fairness would be sacrificed in pursuit of the "perfect" trial. This Court has long held that a litigant is entitled to a fair trial but not a perfect one, because there are no perfect trials. *McDonough* at 553, citing *Brown v. United States*, 411 U.S. 223, 231-232 (1973).

Reading the precedents of this Court in the light most favorable to Petitioner, the participation of a juror who lies on *voir dire* may require a new trial in three situations. First, a new trial may be warranted because an evidentiary hearing uncovers evidence of actual bias. *Smith* at 216. The trial court in the instant case, although showing no reluctance to characterize Van Zandt as untruthful, found no evidence of actual bias against Petitioner. *See* App. A at 12a. Petitioner argues that a pattern of lies prevents the district court from evaluating a juror's bias; *Smith* explicitly rejected a similar

argument that given the propensity for self-justification, a court cannot possibly ascertain impartiality by relying solely upon the testimony of the juror in question. *Smith* at 215.

Second, a new trial may be granted if a juror fails to honestly answer a question on *voir dire* and a correct answer would have provided a valid basis for a challenge for cause. *McDonough* at 556. Petitioner concedes the second prong of the *McDonough* test is not met, *see* Pet. at 4, but argues the *McDonough* test should apply only if the juror, who necessarily lied once to create a basis for a *McDonough* challenge, has a change of heart and offers a "rational and believable" explanation for the lie at a subsequent hearing. *See* Pet. at 9. Petitioner's protestations notwithstanding, the Tenth Circuit was correct in concluding that the rule proposed by Petitioner would inexorably eradicate the second prong of the *McDonough* test and would reduce the *McDonough* inquiry to the sole question of whether the juror's response was dishonest. *See* App. A at 12a-13a.

The wisdom of the *McDonough* standard is that it provides the trial court with an objective basis for a ruling regarding impartiality. The trial court is not required to determine a particular juror's internal motivation to lie on *voir dire*, but rather can assess the probability that bias was the reason for the lie based upon external, objective factors such as the juror's connection with the parties or experiences similar to the subject matter of the trial. Additionally, the *McDonough* standard ensures that a particular juror's fitness to serve on a particular jury will be consistently evaluated, whether challenged during *voir dire* or after a verdict is reached. In contrast, Petitioner's suggested standard of a presumption of implied bias whenever a juror lies "repeatedly" turns solely on the more subjective issue of

credibility. Many more verdicts would be set aside under such a standard because of speculation regarding the reason a juror omitted information on *voir dire*, while the really accomplished liars, who likely wield the most improper influence in the jury room, would have little difficulty persuading the court of their sincerity at an evidentiary hearing.

Finally, a new trial may be warranted when bias can be implied from the particular circumstances of the case. Implied bias differs from the *McDonough* test because it is not dependent on an incorrect *voir dire* answer; instead the issue is whether the juror's personal experiences would make impartiality impossible. Examples of the extreme situations justifying a finding of implied bias were outlined in Justice O'Connor's concurring opinion in *Smith*. These include situations where the juror is an employee of the prosecuting agency, a close relative of one of the participants in the trial, or a witness to the incident that is the subject of the trial. *Id.* at 222. Lower courts addressing claims of implied bias have often expanded the doctrine to include circumstances where there are similarities between the personal experiences of the juror and the issues being litigated. *See Gonzales* at 987; *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991); *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988).

Whether the personal experiences of the juror are so similar to the facts of the case at trial that he or she can be presumed to be biased may be a close question in many cases, but it is not close in the instant case. The trial court found it clear from the evidence presented that Van Zandt was not previously involved in any action similar to the

personal injury action brought by Petitioner against Otis. App. C at 20a; Supp. App. at 37a. Petitioner does not present any link between Van Zandt's circumstances and the facts of Petitioner's case which would support a finding of implied bias under the above standard, arguing instead that bias should be presumed because it is difficult to ascertain exactly why Van Zandt lied.

In other words, Petitioner is asking the Court to relieve the losing party of any burden beyond proving that a juror lied about his or her reasons for giving an incorrect answer on *voir dire*. As this Court observed in *Dennis v. United States*, 339 U.S. 162, 168 (1950), "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact." Maybe Van Zandt was embarrassed by his financial problems, maybe he was daydreaming during *voir dire* and lied to save face, maybe he wanted to sit on the jury to ensure a defense verdict; each of these explanations is pure speculation. If a losing party is relieved of the burden of proving bias, in favor of merely speculating it existed, many if not most verdicts will be subject to new trial.

Just as due process does not require a new trial every time a juror has been placed in a potentially compromising situation, *see Smith* at 217, due process does not require a new trial every time a juror who withholds information on *voir dire* gives an unconvincing explanation of the omission at a subsequent evidentiary hearing. Just as there are varied motives for a juror to conceal information during *voir dire,* there are motives besides bias or partiality for a juror to attempt to justify or conceal the omission at a subsequent evidentiary hearing. A discredited explanation of the omission made on *voir dire*, standing alone, without any

evidence of actual bias or any connection between the juror and either the parties or the facts of the case, does not warrant a presumption of implied bias. If that were the rule, to paraphrase *Smith*, few trials would be constitutionally acceptable.

Petitioner's reliance on *Clark v. United States*, 289 U.S. 1 (1933) is misplaced. The Court did not have to presume bias in *Clark*, as it is asked to do in this case. The evidentiary hearing produced direct evidence the juror first lied for the specific purpose of gaining a seat on the jury to press the case of her former employer and then forced a mistrial by holding out for acquittal without even listening to the reasons for conviction given by other jurors. *See id.* at 7-9. It was this attempt to use her place on the jury to obstruct justice, rather than the lie on *voir dire*, which supported the contempt conviction. *Id.* at 11. In the instant case, Petitioner lacks any evidence juror Van Zandt was motivated to lie in order to remain on the jury and argue in favor of a particular result. The crux of Petitioner's argument is that she should have no obligation to prove motive or bias, but is entitled to a presumption of bias merely by proving a juror lied. This argument is not supported by the facts of *Clark*; more importantly, it is precisely the argument rejected by this Court in *McDonough*.

Petitioner makes no argument that the decision of the Tenth Circuit is inconsistent with the analysis of *McDonough* and *Smith*. Instead, she asks this Court to grant certiorari on the basis of a perceived conflict with one decision of the Ninth Circuit, *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998). As the Court recognized in *Layne & Bowler Corporation v. Western Well Works, Inc.*, 43 S. Ct. 422, 423 (1923), certiorari should be granted only in cases

involving principles of public importance and where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. *Layne* dismissed a grant of certiorari in a patent case because, after careful review of the facts, it became clear that the decisions of the Ninth and Fifth Circuits were really in harmony rather than conflicting. *Id.* at 423.

At first glance, *Dyer* may appear to present such a broad right to new trial on the basis of juror dishonesty that reversal would be appropriate in the instant case, or indeed in any case where it appears a juror lied on *voir dire* about any issue and then and attempted to conceal or explain away the lie at a subsequent evidentiary hearing. Such analysis would conflict with not only the standards employed by the Tenth Circuit[5] but also with numerous prior decisions of the Ninth Circuit.[6] However, when the facts of *Dyer* are considered, the conflict all but disappears.

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5. *See Gonzales* at 987-989 (Doctrine of implied bias applies only in those extreme and exceptional cases where the juror has a personal connection to the parties or the circumstances of the trial or where similarities between the juror's experiences and the incident giving rise to trial would inherently create in a juror a substantial emotional involvement adversely affecting impartiality.); *Burton* at 1158-1159 (Juror involved in an abusive family situation, and struggling with fear and emotional distress because of that situation, should be presumed biased in a case where the defendant killed her husband and claimed she did so to protect herself and her children from continued abuse.)

6. *United States v. Plache*, 913 F.2d 1375, 1378 (9th Cir. 1990) (Doctrine of implied bias applies only in extreme and extraordinary cases presenting a relationship between the juror and the facts of the case with inherent potential for substantial emotional

(Cont'd)

The Petitioner in *Dyer* admitted taking four people hostage and shooting them, but pled diminished capacity. The juror in question answered no to the *voir dire* question "Have you or any of your relatives or close friends ever been the victim of any type of crime?" even though her brother had been pistol whipped and fatally shot in the back of the head. *Id.* at 972-973. When the dishonest *voir dire* answer was discovered during trial, the juror claimed she considered the death accidental. The trial judge was severely criticized by the Ninth Circuit for conducting an extremely cursory hearing lasting less than five minutes; the judge failed to review the case file of the brother's homicide, even though it was provided by the prosecutor, and failed to question the juror regarding her knowledge of the crime or how close she was to her brother. *Id.* at 974-978.

The facts of *Dyer* would have justified a new trial under traditional implied bias standards. Failure to admit the murder of a family member in a murder trial would clearly support a challenge for cause justifying reversal under the *McDonough* standard. The challenged juror was asked to decide the fate of a defendant who admitted committing

(Cont'd)
involvement adversely affecting impartiality.); *Tinsley v. Borg*, 895 F.2d 520 (Bias should not be presumed because juror in rape case failed to disclose that she had counseled rape victims in the context of her employment as a social worker.); *United States v. Allsup*, 566 F.2d 68, 71-72 (9th Cir. 1977) (Jurors in a trial for bank robbery who were employed at a different branch of the bank which was robbed should be presumed biased despite statements of impartiality on *voir dire* because their reasonable apprehension of violence created one of those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial.)

four homicides in a manner fairly similar to the manner in which the juror's own brother was killed. The juror herself had also been the victim of many burglaries, a kidnapping, and an attempted rape. *Id.* at 980. The majority, citing the Tenth Circuit decision of *Burton*, recognized that bias should be presumed only in rare cases. *Id.* at 984. Even the dissenting justices agreed that if the juror knew her brother's death was the result of a murder rather than an accident, she would have the necessary emotional involvement in the case to mandate a presumption of bias. *Id.* at 984, n.23.

Post-trial events in *Dyer* also made the juror's impartiality suspect; she later accepted employment with the California Department of Corrections, serving first as a guard on death row where Dyer was held, and later as a parole agent where she unlawfully reviewed Dyer's file to check the status of his appeal. *Id.* at 982, n.18. The juror did not testify in person at the evidentiary hearing before the federal court considering a writ of *habeas corpus*, because she evaded 21 separate attempts by the defendant to subpoena her. *Id.* at 981, n.16. Thus, the federal district judge did not have the same first-hand ability to assess the juror's credibility and demeanor as the court in the instant case. As this Court noted in *Patton*, the trial court's resolution of credibility questions is entitled to "special deference;" accordingly it will more often be necessary for an appellate court to presume bias when the challenged juror refuses to testify at an evidentiary hearing.

When the extraordinary facts of *Dyer* are considered, the Ninth Circuit's finding of implied bias is reasonably consistent with the precedents of this Court and the implied bias standards applied by other circuits. Therefore, there is no "real and embarrassing conflict of opinion" supporting

review under the *Layne* standard. If *Dyer* is given the much broader construction suggested by Petitioner, under which a new trial is required whenever a juror lies or omits information about any subject on *voir dire* and then offers an unconvincing reason for the omission at the evidentiary hearing, there is admittedly a conflict. However, if *Dyer* is given such a construction, the decision is, quite simply, an aberration. Review on certiorari will do nothing more than affirm that, regardless of Ninth Circuit language to the contrary, a new trial is warranted as a result of a dishonest *voir dire* response only where the incorrect answer would have supported a challenge for cause. As Justice Thomas recognized in his dissenting opinion in *Powell v. Nevada*, 511 U.S. 79, 87, it is a poor use of judicial resources to grant certiorari merely to reaffirm settled law.

CONCLUSION

Petitioner presents no compelling reason this Court should revisit the well-reasoned analysis of juror bias set forth in *McDonough* and *Smith*. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENT'S SUPPLEMENTAL APPENDIX — TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS DATED OCTOBER 30, 1997 AND FILED NOVEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 96-CV-605-H

BARBARA SKAGGS, individually and as Guardian of the Person and the Estate of Roy Skaggs, an incapacitated, person,

Plaintiff,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON OCTOBER 30, 1997

EVIDENTIARY HEARING

BEFORE THE HONORABLE SVEN ERIK HOLMES, Judge

* * *

[2] * * *

PROCEEDINGS

October 30, 1997

THE COURT: Please be seated. The Court calls the case of Skaggs, et al. vs. Otis Elevator Company. Could counsel please identify themselves for the record.

MR. LAIZURE: Yes, Your Honor, Tony Laizure for the plaintiff.

THE COURT: All right.

MR. MANCHESTER: May it please the Court, Robert Manchester and Shannon Emmons on behalf of defendant Otis Elevator Company.

THE COURT: All right. This matter come comes on pursuant to the plaintiff's motion for a new trial or in the alternative request for evidentiary hearing, in light of the apparent discrepancies between the statements made during the voir dire process and what appears to be at least a prima facie showing that one of the jurors, Mr. Douglas Van Zandt, had, in fact, been involved in certain litigation that was not brought [3] to light during the course of the voir dire.

Mr. Laizure, at this time you are recognized, sir. How do you intend to proceed?

MR. LAIZURE: Your Honor, I have subpoenaed Mr. Van Zandt, he is here in the courtroom, and I propose to call him as a witness and question him about some matters.

THE COURT: All right. Please proceed.

MR. LAIZURE: I would call Mr. Van Zandt to the stand.

THE COURT: Mr. Van Zandt, please come forward and be sworn.

Appendix

DOUGLAS THORNTON VAN ZANDT

Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE COURT: Why don't we move the podium over here, if you would Mr. Maras and give Mr. Laizure more — Have a seat, sir.

All right, please proceed.

DIRECT EXAMINATION

BY MR. LAIZURE:

Q. Would you state your name please, sir?

A. Yes, my full name is Douglas Thornton Van Zandt.

Q. Okay. And where do you live, Mr. Van Zandt?

A. I live at Post Office Box 1, Talala, Oklahoma.

Q. And are you married?

[4] A. Yes, I am.

Q. What is your wife's name, please?

A. Sandra Van Zandt.

Q. Mr. Van Zandt, what is your present business or occupation?

A. I'm involved in art sales.

Q. And can you be more specific?

A. Yes. We present and sell in the sale of monumental bronze sculpture in regards to fund raising for most tax exempt nonprofit corporations.

Q. And who is the artist?

A. My wife is the artist.

MR. MANCHESTER: Your Honor, I don't believe the microphone is working for Mr. Laizure. I can hear the witness clearly but I'm not hearing what Mr. Laizure is saying.

MR. LAIZURE: I'll speak up.

THE COURT: All right, if you could, sir. Thank you. All right, without the benefit of the jury we can raise our volume at this time to take care of Mr. Manchester.

Go ahead, sir.

MR. LAIZURE: Thank you, Your Honor.

Q. (By Mr. Laizure) How long have you and your wife been in this kind of business Mr. Van Zandt?

A. Well, permanently about 12 to 15 years, sir.

Q. And prior to that time were you and her involved in it on [5] a temporary basis?

A. Basically myself part-time and her part-time, yes, sir.

Q. And for how long have you been in this business altogether?

A. Fifteen, 18 years. I don't know, about 1979, I think we kind of really kicked off into it.

Q. How old of a man are you, sir?

A. I'm 53. I will be 54 the 12th of November.

Q. And I believe when you were questioned or when you introduced yourself during the trial you told us a little bit about your educational background. Do you have a degree from the University of Texas?

A. Yes, sir, I do.

Q. And what is that degree in?

A. Business administration.

Q. And when did you obtain that degree?

A. 1971, sir.

Q. And do you have any postgraduate work?

A. Yes, sir, I do.

Q. What is that, sir?

A. It's in international business. I do not have a degree in that, but I have postgraduate work in both international transportation and marketing.

Q. Do you have military service?

A. Yes, sir, I do.

[6] Q. And what is that, sir?

A. I was 3 years 11 months and 89 days in the United States Marine Corps and served in Vietnam, sir.

Q. And what period of time would that entail, please?

A. 1963, March 18th, through 1967.

Q. And I believe you also referenced in your statement during jury selection that you have some international business experience with PepsiCo or Frito Lay?

A. I was of employee with Frito Lay. Yes, sir, I did work with PepsiCo, and then more recently than that with the Richards Group as the Director of International Services for an ad agency in Dallas.

Q. Tell me if you would, sir, please, your dates of employment for Frito Lay?

A. I was employed there upon graduation from the University of Texas, that would be 1971, July - August through 1975, December, I believe, sir.

Q. And in what capacity did you work for Frito Lay?

A. I was hired as a management trainee. I was a district sales manager in the Bronx, New York. I went from there as district sales manager in Little Falls, New Jersey, and then I went as a regional sales manager covering the east coast, and then on to be the manager what is called space management, space allocation in major department stores throughout the east coast, which spread from South Carolina, roughly, through the [7] eastern part of Canada.

Q. What were your dates of employment with PepsiCo?

A. Well, that was during that same period of time, sir. PepsiCo is the parent company to Frito Lay and I was assigned over there. I was still paid by Frito Lay but since I was in the Northeast and the corporate headquarters for PepsiCo is in Purchase, New York, I was attached over there for last portion of my employment, sir.

Q. Then when did this work for the Richards Group take place?

A. I believe I was there, sir, in '83 through '85. '83 through '85, yes, sir. And during that time I was responsible for the international services part of that company, sir. I was the director of international services.

Q. And when did you move to the State of Oklahoma?

A. 1985, sir.

Q. Prior to 1985 had you ever been involved in a lawsuit?

A. Not that I can remember, sir. Well, you know, now that all of this has been brought up and I read the testimony for retrial, yes, sir I was divorced, so I guess that was — I guess that was a lawsuit. I — I didn't realize that was. But, yes, I guess I was prior to 1985.

Q. And what testimony have you read?

A. Your — well, actually your — I don't know if it was testimony. I think it's your plaintiff's motion for new trial or hearing —

[8] Q. Okay.

A. — that was filed August the 14th, sir.

Q. Did you get that on your own?

A. No, sir, I didn't.

Q. Okay. Now, since 1985 have you been involved in any lawsuits?

A. Yes, sir, I have.

Q. And do you know how many?

A. No, not really. Many of which were dismissed, or whatever, but I have been involved in some, yes, sir.

Q. Okay.

A. I will say three or four lawsuits pertaining to business.

Q. Okay. Were you charged in 1988 with obtaining merchandise by bogus check in Rogers County?

A. To my knowledge, I'm not sure what that charge was. I never did go to court or anything like that. It was a situation where we were out of the country and we did pay for something and a check that we received was no good, and when we came back in we found out there had been a lawsuit filed against us. We immediately took care of that. So I never went to court or anything like that. It was something we didn't know about until we got back, sir.

Q. My question was, were you charged with a felony?

A. Obviously I was charged.

Q. All right, sir. Then have you been sued on occasion by [9] lawyers for legal fees?

A. As a result of a bankruptcy, yes, sir, they were — there were an attorney that did sue, sir.

Q. Okay. Were you sued, you and your wife sued by an attorney named Sandra Cole?

A. Yes, sir.

Q. And were you and your wife also sued by the Stratton Taylor law firm?

A. That's correct, sir.

Q. Okay. Are there any other law firms that have sued you for legal fees?

A. Not to — not to my knowledge, sir. They were part of the bankruptcy, sir.

Q. All right. Well, you were sued and judgment — were judgments rendered against you and your wife in both those cases?

A. Yes.

Q. All right. And you and your wife were also sued by John Baden, d/b/a Baden's Welding?

A. That's correct sir.

Q. And all of these lawsuits were filed in 1995 or 1996, were they not?

A. To the best of my knowledge, sir.

Q. Now, you did mention that you and your wife had filed bankruptcy; is that correct?

[10] A. That's affirmative, sir.

Q. Okay. I have placed some exhibits in front of you, Mr. Van Zandt. Could you find Plaintiff's Exhibit 5 which is Schedule F?

MR. LAIZURE: Actually, Your Honor, I've misnumbered. That should be Plaintiff's Exhibit 6 you are looking at and Plaintiff's Exhibit 5 is the last one in that group.

THE COURT: All right.

Q. (By Mr. Laizure) Is that the Creditors Holding Unsecured Nonpriority Schedule that you and your wife filed in your bankruptcy case?

A. Yes, sir, in the Chapter 7 bankruptcy case, that's correct, sir.

Q. All right, sir. And that bankruptcy case was filed here in the federal court in Tulsa sometime in —

A. October of '95 — '96, sir.

Q. Yes, September 30, 1996; is that correct?

A. That's correct, sir.

Q. All right. Now, in that Schedule F there are — there's Number 7 is a debt owed to Baden's Welding. And is that the same Baden that sued you and your wife?

A. That's correct, sir.

Q. And then Account Number 8 is the judgment that was rendered against you in favor of the Stratton Taylor law firm; is that correct?

[11] A. That's correct, sir.

Q. And Account Number 11 is a judgment rendered against you and your wife in favor of Claremore Welding Supply; is that correct?

A. That's correct, sir.

Q. Account Number 13 is a judgment in the amount of $45,756.73 against you and your wife in favor of an Edward Arrigoni?

A. Correct, sir.

Q. What was that related to?

A. It was failure — it was failure to deliver merchandise, sir.

Q. All right. And Account Number —

A. In a timely manner.

Q. Excuse me. Account Number 14 is a bill for legal services from the Head and Johnson law firm here in Tulsa?

A. That's correct, sir.

Q. Are they patent and trademark attorneys?

A. They are, sir.

Q. And Account Number 25 is the debt to Sandra Cole for legal services which had been reduced to judgment by the time you had filed this, was it not?

A. That's correct, sir.

Q. All right. And then Account Number 26 judgment creditor of T-A-S-S, Inc. Can you tell me what that's about?

[12] A. That was some accounting services that was handled over in the bankruptcy.

Q. All right, sir.

A. All of these judgments and debts were because of a creditor forcing us to seek protection under the bankruptcy code, sir.

Q. All right. Now, as a result of that we see that in addition to the bankruptcy proceeding you and your wife have been involved in at least six lawsuits, at least what's listed on your schedule; is that correct?

A. Yes, sir, we have been. Nonappearance on most of them, sir.

Q. All right. Now, and then you filed for bankruptcy in September of 1996; is that correct?

A. Affirmative.

Q. And then you dismissed your bankruptcy in May of 1997, didn't you?

A. That's correct, sir.

Q. And why did you do that?

A. We did that because we felt as if we had some contracts pending that we could pay our creditors, and we wanted to do that, sir.

Q. Okay. Now, you were served, were you not, in December of 1996 or January of 1997 with a complaint that the trustee had filed against you and your wife?

[13] A. That is correct, sir.

Q. All right. And in that complaint there were allegations that you and your wife had concealed, removed and failed to disclose assets within year before the commencement of your bankruptcy; correct?

A. The allegations that were in that adversarial proceeding were so numerous. There was everything from — who knows what all was in there, so I'm sure that was in there.

Q. Well, it's Plaintiff's Exhibit 4 in front of you if you want to refresh your memory if you can't remember.

And you're right, sir, there were a number of allegations all of which have to do with fraud, concealment of assets, transfer of assets improperly, and numerous violations of the bankruptcy code; isn't that correct?

A. Yes, sir.

Q. And you were aware, were you not, at that time that the bankruptcy trustee was objecting to your seeking bankruptcy on the basis that you and your wife had allegedly committed numerous acts of fraud; correct?

A. I don't know if that's correct, sir. I would like to have opportunity for counsel if that's — in regard to this, since this case has been changed to a Chapter 13 bankruptcy, sir, and will not be heard until Monday, November the 4th.

Q. Okay.

A. All of those were dismissed, sir.

[14] Q. I understand that. Those were the allegations that were made by the bankruptcy trustee; correct?

A. And they were allegations, sir.

Q. Yes. And then in May of 1997 you and your wife dismissed your bankruptcy previously filed?

A. That's correct, sir, as I stated before.

Q. Now, when were you called to serve as a juror in this case?

A. I'm sorry, Mr. Laizure, I don't have that in front of me. I'm sure you do.

Q. Well, let me ask you this, first of all. How did you feel when you and your wife received notice that the bankruptcy trustee was accusing you and her of bankruptcy fraud?

A. I thought it was absurd.

Q. Were you angry about it?

A. Oh, no, no.

Q. No. And why did you think it was absurd?

A. Because none of the allegations were true. They were — he — all — he acted on hearsay and it was proven, sir.

Q. All right. Was there a trial?

A. No, sir.

Q. And did you ever give a deposition in the case?

A. No, sir, not to my knowledge, sir.

Q. All right. And how did you feel when the lawyers and other people had sued you and your wife for nonpayment of fees [15] and nondelivery of services and obtained judgments against you?

A. We had spoken with Stratton Taylor and with all of the law firms and all of the creditors with the exception of Mr. Baden. They understood what the situation was, but they had to proceed according to law in regards to those judgments. They know that, and we are — still work with them and, you know, I think they all — they realize that we were forced into this bankruptcy by the creditor John Baden.

Q. Okay. Well, my question was how does it make you feel when all of the lawsuits and judgments were rendered against you?

A. Well, I, you know, I again, I did everything that I could to dismiss that and pay them in full, which I certainly plan on doing, sir.

Q. Well, how did it make you feel?

A. I had already talked with them. It didn't make me feel any different at all. This is something that just had to be done in the course of the law, sir.

Q. Do you remember sitting here in the jury box while the judge was conducting his questioning of the potential jurors?

A. Yes, sir, I do.

Q. And do you remember the judge telling the panel that the jury service was a civic duty and a legal obligation?

A. Oh, yes, sir. Yes, sir.

Q. And that your office as a juror was one of extreme public [16] trust?

A. You betcha.

Q. And that the services that you jurors would perform would be essential to the administration of justice?

A. Yes, sir.

Q. And that as prospective jurors you would be questioned to determine your qualifications to serve in the case?

A. Yes, sir.

Q. And that the purpose of the questions was so the parties could obtain a fair trial?

A. That is correct, sir.

Q. And that it was necessary that you be given an oath to answer truthfully all questions asked about you — asked you about your qualifications to serve as jurors?

A. Yes, sir.

Q. And do you remember the judge telling you that it was important for you to answer the questions fully and truthfully?

A. Yes, sir.

Q. And do you remember the judge telling you that if for any reason you wanted to respond privately, that you could have the opportunity to come forward to the bench and give a response?

A. Well, yes, sir, I believe I — the reason I believe that is because someone did that, yes, sir.

Q. All right. And do you remember the judge asking the jurors as a whole if any of them, or members of their immediate [17] family, had ever participated in a lawsuit, either as a party or in some other capacity such as a witness?

A. Yes, sir, I do.

Q. And did you respond that you and your wife had participated in these lawsuits?

A. No, sir, I don't think I responded at all, sir.

Q. Okay. And could you tell the Court why you did not respond that you had participated in all of these lawsuits, including a bankruptcy proceeding that had just been discharged or dismissed two months before jury selection?

A. Well, Mr. Laizure, to be honest with you, I really didn't understand that question as it pertained to me. Now, the reason I didn't understand that question is because the term "lawsuits" was used. And you automatically have the mind-set when you walk into this court that someone has either been hurt, or run over by a car and there is going to be great damages and things like that. To be honest with you, I didn't even think about the bankruptcy or divorce or anything like that being a part of something like this that was so, you know, so horrible. One out of eight people have been a part of a bankruptcy, sir, and I don't think there's very many jurors that are not sitting up there that don't have some baggage. I can tell you that I — it didn't even occur to me. And I can also tell you that in no way possible did this bias me in any way with my decision or that jury's decision.

[18] Q. Did you think that if you had truthfully disclosed your participation in lawsuits, including one in which you were accused of bankruptcy fraud, that you would be removed from the jury panel?

A. No, sir I knew that I — like I said before, I didn't even think anything about the lawsuit, a bankruptcy or divorce or anything like that. I had been involved in both of them and I think other people up there had too.

Q. Are you saying that you don't know what a lawsuit is?

A. I didn't know say that, no, sir.

Q. All right, sir. Well, when the judge asked you if you had ever been involved in a lawsuit, are you saying that you didn't understand the question, sir?

A. I'm saying that I didn't understand it as it pertained to me, especially in the case of a bankruptcy or a divorce, sir, no, sir. I will tell you that, truthfully.

Q. Was there any reason why you didn't ask the Court to rephrase the question or tell the parties that you didn't understand what the question meant?

A. Well, no, I didn't think it had any relevance.

Q. Well, you had, in fact, been involved in six or seven lawsuits, had you not, sir?

A. Well, I don't know if there were that many, but whatever you say I will agree with.

Q. Okay. And you are telling me your reason for not telling [19] the judge that you had been involved in a lawsuit when he asked you that direct question is you didn't think the question pertained to you?

A. That's correct, I didn't feel as if bankruptcy, divorce or things is what we were looking at. As I said before, Mr. Laizure, we are of the mind-set when we come to the federal courthouse that there has been some horrible damage done, be it Oklahoma City bombing, someone run over by a truck, and death and dismemberment occur. I had no idea that my personal financial problems, of which were behind me, were

a part of this. You know, I really didn't. And, again, it certainly didn't have any basis on my decision.

Q. All right.

A. I served this court as I served my country, sir.

Q. Prior to coming in the courtroom did you have an idea as to what this — I guess you had an idea as to what this dispute was about since you had read the motion for new trial?

A. Oh, yes, after I had spoken with you and received — yes, sir.

Q. And how did you get the motion for new trial?

A. It was a part of the subpoena from — well, I believe, the law firm is called — well, it's Robert Manchester. It was delivered by Larry Upchurch who is, I guess, a private investigator.

Q. And did you speak with —

[20] A. I didn't get that from you.

Q. Okay. Did you speak with either Mr. Manchester or Ms. Emmons or any representative of their law firm?

A. I did speak with Mr. Manchester and Mrs. Emmons after I was served with this, and I read this, sure. And I would have called you, sir, if I would have known what this was

all about. I think you were somewhat evasive when I asked you what it was all about.

Q. Well —

A. I'm sure you don't have to give me this information, but anyway I thought it was deceptive on your behalf.

THE COURT: Mr. Van Zandt, could you respond just to the question please, sir.

THE WITNESS: I'm sorry, sir.

Q. (By Mr. Laizure) And what did you and Mr. Manchester and Ms. Emmons discuss about the proceedings that were going to be taking place today?

A. Basically he asked me if, if these — these problems that were in this retrial motion had any effect on my decision.

MR. LAIZURE: I believe that's all of the questions I have, Your Honor.

THE COURT: All right. Mr. Manchester, your witness.

MR. MANCHESTER: Thank you, Your Honor.

Appendix

CROSS-EXAMINATION

BY MR. MANCHESTER:

[21] Q. Mr. Van Zandt, so that the record is clear, your conversations with me were by telephone?

A. Correct, sir.

Q. And your conversations with Mr. Laizure were by telephone?

A. That's correct, sir.

Q. And you were furnished all of the pleadings by our office as they reflect or as they relate to this hearing here today?

A. That's correct, sir.

Q. All right. Now, I really have but one question for you so that it will be clear from the record, and I'm reading from Page 17 of the transcript on the voir dire examination and the question the judge asked you starting at line 5. "Have any of you-all or members of your immediate family ever participated in a lawsuit, either as a party or in some capacity such as a witness, anybody have experience in being parties or witnesses in a lawsuit?"

Now, that's the question as was asked by Judge Holmes. At the time that question was asked of you, are you telling this Court and jury you did not consider that in connection with the bankruptcy proceeding?

A. Mr. Manchester, I doubt very seriously if anyone in that jury box comes here without any baggage. I didn't even consider it.

Q. All right, sir.

MR. MANCHESTER: Pass the witness.

[22] THE COURT: Mr. Laizure, anything further, sir?

MR. LAIZURE: No, Your Honor.

THE COURT: All right. Let me if I could, Mr. Van Zandt ask you a couple of questions. You have in front of you, do you not, the plaintiff's motion here for new trial, or in the alternative request for evidentiary hearing?

THE WITNESS: Yes, sir, I do.

THE COURT: And beginning as listed on Page 1, Paragraph 1, are these, each of these numbered paragraphs identifying legal proceedings, some cases lawsuits, some cases extensions of existing proceedings, some cases, at least in the case of the filing by bogus check is not private litigation, are each of these six numbered paragraphs true and correct, sir?

THE WITNESS: To the best of my knowledge, sir, yes sir.

THE COURT: Okay. Now, Mr. Laizure, for the record, are there, in addition to these are there additional proceedings that you're —

MR. LAIZURE: Your Honor, the only ones that I would know of, and I would not know of them by case number, but they would be referred to in the Plaintiff's Exhibit 5 by the designation judgment creditor, which by definition would mean there would have had to have been a lawsuit and a judgment rendered against Mr. and Mrs. Van Zandt. And I went over each [23] one of them with him during my questioning.

THE COURT: Okay. So we believe that these six encompass the extent of the litigation, at least to the best of your knowledge, sir?

MR. LAIZURE: Well, actually there is on Plaintiff's Exhibit 5, Account Number or Paragraph Number 11, judgment by Claremore Welding Supply not listed in the motion; the judgment in favor of Mr. Arrigoni, Number 13 is not listed.

THE COURT: All right.

MR. LAIZURE: And the judgment Number 26 in favor of TASS, Inc. against them, Number 26 is not listed. So those three additional legal proceedings.

THE COURT: So we believe — that is Number 26. We believe that from your standpoint that constitutes the universe, at least for this purpose from your standpoint?

MR. LAIZURE: As far as —

THE COURT: From your standpoint. That's not dispositive.

MR. LAIZURE: Yes, Your Honor, as far as we are able to determine, yes.

THE COURT: All right. Mr. Van Zandt, you see those six paragraphs, you have heard him refer to three additional matters which you have identified as judgment creditors, one is Claremore Welding Supply, the second is Edward Arrigoni, and the third one is TASS, Inc., which totals nine different [24] matters. Are these — are you aware, other than those nine, of any other lawsuits —

THE WITNESS: No, sir.

THE COURT: — recognizing that lawsuits include any kind of legal filing wherein parties are identified and claims are made through judicial process?

THE WITNESS: No, sir, I am not aware of that. And, again, all of those individuals have been addressed. And our business and ourselves had to seek this protection. And every one of those people, including the attorneys, have been — understand our situation. They had to file, we understood that, and again we made reference to pay in full our debts, sir.

THE COURT: Okay. And with the exception of the matter which resulted in the filing for bogus check, with respect to the other eight, is it correct, sir, that all of these revolved around your bankruptcy, either the shortfalls that occurred in the filing of the bankruptcy itself, the shortfalls that occurred in connection with the bankruptcy, or the legal fees that were run up?

THE WITNESS: Yes, sir, they were all — that was — that has been our problem for the last two years, sir.

THE COURT: All right. Now putting yourself back to the point of the voir dire process. Mr. Laizure has focused in some degree upon what you were thinking when you failed to [25] respond to this question affirmatively, but recognizing now that these are considered for purposes of that question to, in fact, be lawsuits and within the four corners of that question, the question then becomes, is recognizing you have had these financial problems and that they have resulted in these kind of legal proceedings which, in fact, are lawsuits, as that term is commonly known, is there anything about those experiences that might interfere with your ability to be completely fair as a juror in that case or in any case?

THE WITNESS: None whatsoever, sir.

THE COURT: All right. Is there something about your experiences in dealing with the judicial process, whether by the process where you were out of town, or the filing of the bankruptcy suit, or the filing by various creditors of individual collection actions, anything about that that has caused you to have a particular opinion or view of the judicial process that might affect your ability to serve as a juror in any case?

THE WITNESS: None whatsoever, sir. Might I expand on that, Your Honor?

THE COURT: Certainly.

THE WITNESS: I was the one person, Mr. Laizure, that sought any type of indication that there may be a parcel of evidence against the big company. You've got to understand I was with big companies and I've seen them, I've been a part of [26] firing them right before they received their retirement. I don't like that. I've got more prejudice against large companies than anything. And I was the one person in this jury that did everything possible to see if there was anything that a judgment could be awarded to Mrs. Skaggs or to Roy Skaggs.

THE COURT: Mr. Van Zandt, let me. My focus of my question, as I tried to make clear, was not to open up the deliberative process, because analytically we don't reach such an opening of the deliberative process unless and until there becomes a basis to do so. My focus is putting yourself at the beginning of that process, and at the point of the voir dire, is to ascertain whether or not at that point in time whether there was anything about these legal proceedings that might affect your ability to serve as a juror on any case, not on in case in particular but on any case?

THE WITNESS: None whatsoever, sir.

THE COURT: Do you bring to that process a particular point of view as a result of these legal proceedings?

THE WITNESS: I did not bring any point of view to this proceeding as a result of anything that had happened to me in the past, sir.

THE COURT: All right. Mr. Laizure, anything further from this witness?

MR. LAIZURE: No, Your Honor.

THE COURT: All right.

[27] MR. MANCHESTER: No, Your Honor.

THE COURT: All right. The witness may step down.

All right, Mr. Laizure, anything further as far as evidence, sir?

MR. LAIZURE: No, Your Honor. Well, I would offer to introduce the Exhibits 1 through 5.

THE COURT: All right.

MR. MANCHESTER: No objection.

THE COURT: They will be admitted.

All right, Mr. Laizure, you are recognized, sir. Further argument on this issue.

MR. LAIZURE: Thank you, Your Honor.

Your Honor, I am really distressed and troubled over the proceedings today because I'm really caught in a predicament between the zealous representation of my client and saying some things that I would not ordinarily say, but I am bound by the Constitution and by the oath I took and by the code of ethics to zealously represent my client within the bounds of the law, and that's what I'm going to do today.

Quite frankly, I think Mr. Van Zandt is a liar. He is a highly educated man, he has a degree from the University of Texas, he has postgraduate work, he's worked for major corporations in the international field, and for him to come in here and say, after he has read the motion for new trial, that he didn't think that question pertained to him, or any of the numerous [28] lawsuits that had been filed against him and his wife, is not worthy of this Court's belief. I know it's not worthy of my belief; I hope it's not worthy of your belief. I believe that he deliberately failed to answer the question honestly when you asked him in voir dire, and I believe that he has further perpetuated his dishonesty up there on the witness stand. This is a man with a considerable litigation history who had just been in the few months prior to this lawsuit, been accused of several acts constituting bankruptcy fraud. And for him — and he has judgments against him by lawyers that have represented him. And for him to come in here and say that he brings to this Court a clean slate with no prejudice against one side or the other is just simply not worthy of belief. I think that under the facts of this case the Court is aware of what is required under McDonough and what's required under the Gonzalez case. I believe his blatant dishonesty conclusively proves actual and implied bias and that we are entitled to a new trial because we were not given a fair trial due to the dishonesty of this juror.

THE COURT: All right. Mr. Manchester.

MR. MANCHESTER: Thank you, Your Honor. May it please the Court reference was just made to McDonough. We might look at that United States Supreme Court decision

because I think the standard is quite clear. A party must first demonstrate that a juror failed to answer honestly a material question on [29] voir dire, and then further — further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial.

I suggest to you, I suggest to this Court that there is no showing that the failure to answer that question — and I'm not at all convinced, in fact, I am convinced to the contrary as far as this witness' failure to disclose. The question was have any of you or any members of your immediate family ever participated in a lawsuit, either as a party or in some other capacity such as witnesses.

Now, it's not written here, but I have seen judges or heard judges, I should say, on numerous occasions, both in federal and state court, don't tell me about your divorces, don't tell me about your bankruptcy, I just want to get into lawsuits in which you are involved in this court. Now, as the Court is well aware —

THE COURT: So that cuts this list down to about six.

MR. MANCHESTER: I'm sorry, sir?

THE COURT: So that cuts this list down to six then.

MR. MANCHESTER: All right, sir. It is a list of lawsuits that were filed but —

THE COURT: Real live lawsuits; right?

MR. MANCHESTER: Real live lawsuit. But they are not [30] participated, I suggest to this Court, in the same manner that lawsuits such as the case that was tried before this Court in four days of July of this year, they are not handled in that same manner. We took numerous depositions, I wouldn't attempt to count, probably 25, maybe 30 depositions were taken in this case. Suits on open account. Classically the lawsuit is filed, the process is served and a default judgment is ultimately entered, I mean, that's the commercial practice the work starts after the judgment is entered in which the lawyer attempts to take whatever steps are necessary to collect it. And I do think it is —

THE COURT: So you are saying if Mr. Van Zandt was a lawyer he might have had a different view of the word "lawsuit," but he was not of course.

MR. MANCHESTER: Yes, sir —

THE COURT: I suspect --

MR. MANCHESTER: — I think if I'm served with process and I don't — I do not understand the mechanics of the judicial process, and I take that process and I give it to a lawyer, or I deliver the pleadings to a lawyer who is preparing a bankruptcy schedule, I see that as something as perceived as different.

THE COURT: Let me ask you this, Mr. Manchester.

MR. MANCHESTER: Yes, sir.

THE COURT: Without meaning to embarrass, have you [31] ever been sued?

MR. MANCHESTER: Have I been sued?

THE COURT: Yes

MR. MANCHESTER: Yes, sir.

THE COURT: Okay. Now, when you got that process with your name in the caption, particularly being a skilled and experienced attorney, as you are, you must say that you knew at that moment that you were a party to a lawsuit.

MR. MANCHESTER: Yes, sir, and I was party —

THE COURT: And you knew that both as a very able attorney but also as a human being, having been served with a piece of paper with your name on it, the kind of empty feeling that one gets being a party to a lawsuit, you knew at that moment that not only as a lawyer but as a person you felt that feeling; right?

MR. MANCHESTER: I knew that, sir.

THE COURT: Even if it was completely meritless and frivolous, it nevertheless accompanied with it that sense of certainty that this was something that's not going to go away, like somebody hitting your car in a parking lot.

MR. MANCHESTER: Yes, sir, and I knew that after graduating from law school and having, I think it was seven years in the practice of law at the time that occurred. The witness does not fall in that category. When I talked to the witness, as did Mr. Laizure, he said I was served a summons. [32] Obviously, we know it was a subpoena.

I don't think in fairness, and one thing that my ears locked in on that was said by Mr. Van Zandt, we all bring some baggage to the courtroom. The question, the critical question is, did this affect the outcome of this jury verdict?

THE COURT: Well, let me say this briefly, is that your argument is much better focused on McDonough Power Equipment, Inc. than on the question of whether or not the inquiry by the Court, have you ever been involved in a lawsuit —

MR. MANCHESTER: All right.

THE COURT: — should yield a factual recitation that looks something like the list.

MR. MANCHESTER: I will focus accordingly.

THE COURT: So, that is, if you are going to undertake to persuade me that he shouldn't know that he was involved in a lawsuit, then we may as well start picking a new jury.

MR. MANCHESTER: All right, sir. I would suggest —

THE COURT: All right. But that's not the issue, nor is it the law to which I'm bound.

I tell you we're going to do, we're going to take a five minute break and we will take it up in my conference room in five minutes. All right.

MR. MANCHESTER: Thank you, Your Honor.

(Recess).

[33] (The following proceedings were held in the conference room.)

THE COURT: Please be seated. Under McDonough Power Equipment, Inc. vs. Greenwood, 464 U.S. 548, 1984 case, the Supreme Court held that to obtain a new trial a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

The Court finds that indeed this was a material question, and I can assure you that the Court finds that he failed to answer it honestly. I'm not prepared to credit in any shape, manner or form the explanation proffered on the stand.

The second part, however, is that it would have provided a valid basis for a challenge for cause. And I have spent a good deal of time examining these different lawsuits as they exist, and it is certainly clear to me that at least with respect to what I saw on the list, originally it was five, now eight of

the nine, are all surrounding the same financial reversal which included in it the bankruptcy as well as falling late due on payment schedules, and then as a result of that being unable to pay.

I'm having grave difficulty finding that those kinds of suits would form the basis for a challenge for cause. In [34] looking at other applicable authorities it seems to me that the cornerstone of this kind of a claim is that there is something about the nature of the lawsuits that were not mentioned that in fact were related in some way to the subject matter of the lawsuit at issue. That is, specifically cases where the matter dealt in some way with physical confrontation or abuse and somebody had been the object of abuse. It's clearly material the failure to answer honestly. But related to the subject matter, the kind of thing that would have caused us to all come forward and talk about further additional questions that we wanted to know, and as a result, to form the basis of a claim for cause, knowing with a certainty that an individual member of the panel had been the object of a series of suits, particularly almost all of them around the same financial reversals, there is no articulable basis on that record that would form a challenge for cause. It appears to me that the thrust of the argument at this time is that now that we know he's a liar, that's a basis for cause. And the answer to that is the Supreme Court contemplates specifically that you reach the second prong of the analysis after having determined he was a liar or she was a liar. Indeed, it requires that you say that the juror failed to answer honestly a material question. So the Supreme Court itself contemplates you have already established that there had been intentional, material, dishonest response. The Supreme

Court doesn't stop there, nor [35] does our inquiry. We are, in fact, at that point. But that's not what forms the basis for dismissal for cause. What forms the basis for the purpose dismissal for cause is had he answered honestly, would that form the basis for dismissal for cause. And there is nothing that I see in an honest response, assuming a capability not yet demonstrated in this court, that you would have on that record been able to come forward and seek a for cause dismissal, or that you would have come forward and sought additional information, which we now have about those actions, and as a result seek a for cause dismissal. So not only on its face is it not a basis for for cause dismissal, but it also does not and has not led to information which, once acquired, would form the basis of a for cause dismissal. And on that grounds, I don't believe that it meets the McDonough Power Equipment requirement.

And I will say that the only reason for having this take place in the conference room is that there is nothing about this ruling, which is hereby ruled in favor of the defendant, there is nothing about this ruling that I felt that I wanted to say out there such that this prospective — or this juror would think that he did something, that there was a lack of merit in the motion. There is no lack of merit in the motion, and certainly insofar as anything that he would feel good about knowing. It is highly meritorious on the first prong. It is simply that the Supreme Court requires that once [36] you have made that, established that fact, that there still be more in order to gain a new trial. I just don't believe that the subject matter of these lawsuits forms the basis of a for cause, or even once you know everything there is to know about it forms the basis of a for cause.

I will note further that it certainly has occurred to me whether or not to refer this matter to the United States Attorney, recognizing that this was testimony under oath at the time of the voir dire process, and that's just a matter of further consideration by me, but to the extent that that consideration had been raised earlier in this process, he did nothing today to dispel my fe lings about it. But that's not — the law requires simply more than the dishonest, the failure to answer honestly a material question in voir dire, it clearly and unmistakably requires the second leg be satisfied, and I find these fact record in these cases and these responses here in this hearing, as well as a review of those cases, that it does not satisfy the second requirement. So the motion will be denied.

All right, anything further in this regard? Mr. Laizure, anything further, sir?

MR. LAIZURE: No, Your Honor.

THE COURT: All right. Mr. Manchester?

MR. MANCHESTER: No, Your Honor.

MR. MANCHESTER: Ms. Emmons?

[37] MS. EMMONS: No, Your Honor.

THE COURT: All right. We will have a written order prepared and on file here in the next, probably sometime next week to that effect.

MR. LAIZURE: Very well.

MR. MANCHESTER: Thank you, Your Honor.